(both identifying administrative complaints numbered 97-LE-MS01 and 97-LE-MS02). Additionally, the Appellant advanced at least some of the allegations contained in administrative complaint numbered 96-LE-MS05. See Exhibit 3, ¶¶ 32, 33" [Defendant's Motion for Summary Judgement, p. 4, para 11].

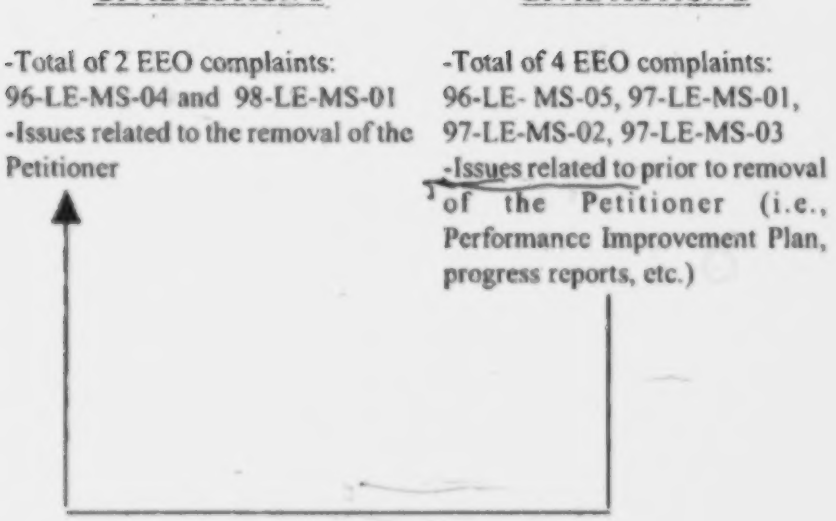
10. The Petitioner's two EEO complaints from Civil Action 2, 97-LE-MS-01 and 97-LE-MS-02, were *never* litigated. Instead, the EEOC issued an ORDER remanding the two EEO complaints to the Agency directing them to hold the complaints because of the Petitioner's medical condition [Petitioner's oral arguments Ex. I-2]. Therefore, the Respondent deceived the Court that these two EEO complaints were litigated. Additionally, the Petitioner *never* advanced at least some of the allegations contained in administrative complaints numbered 96-LE-MS-05 (of Civil Action 2), as the Respondent stated. The fact is that the EEOC overturned the Agency's decision and directed the Agency to investigate the complaints [Petitioner's oral arguments Ex. C-1-4].

REASONS FOR ALLOWANCE OF THE WRIT

1. This Case Merits The Supreme Court's Review And Is Of National Importance. The Decision In This Case Is In Conflict With The Decision Of Other Courts.

The Court unlawfully denied the Petitioner's Motion to exhaust his administrative remedies for EEO complaints and to consolidate all claims in one civil action. The Court of Appeals for the 4th Circuit, when it rendered its decision in this case, had the benefit of, but disregarded, prior decisions of other Courts of Appeal who reversed lower court decisions because the petitioner was denied the right to exhaust his administrative remedies and furthermore overlooked laws and material facts presented in the entire case.

In addition, the ramifications of the 4th Circuit decision are significant. Left undisturbed, it would pre-empt the federal government regulations and harm the Petitioner and others whose request to exhaust administrative remedies for their EEO complaints are unlawfully denied. Every employee nationwide, similar to the Petitioner, will be punished because of the abuse of discretion of the Court. In this case, the Court rendered a decision for the Petitioner's removal action contained in Civil Action 1 knowing that the decision of the EEO complaints contained in Civil Action 2, which led to the Petitioner's removal action, should be rendered before rendering a decision for EEO complaints contained in Civil Action 1. The Court further unlawfully denied the Petitioner's right to exhaust his administrative remedies, overruling previous Supreme Court decisions. The chart on the next page illustrates this point:



Based on the chronology of events, Civil Action 2 should have been decided before Civil Action 1. Therefore, during Civil Action 1, the Petitioner requested a stay until he exhausted his legal administrative remedies for Civil Action 2. The Court denied the Petitioner's request for a stay and dismissed Civil Action 1 by granting a Motion for Summary Judgment to the Respondent.

In this instance, the Petitioner attempted to exhaust his administrative remedies for the pending EEO complaints in Civil Action 2 and tried to consolidate all claims in one Civil Action. However, the District Court denied the Petitioner's request. Furthermore, the District Court disregarded the law and granted a Motion for Summary Judgement in favor of the Respondent. The Court failed to provide a stay for Civil Action 1 knowing that the Petitioner neither brought all of the claims together nor exhausted his legal administrative remedies for his four EEO complaints contained in Civil Action 2.

2. **Review Of This Case Is Essential To Decide The Court's Unlawful Actions And Errors Denying The Petitioner's Right To Exhaust His Legal Administrative Remedies For Four EEO Complaints Contained In Civil Action 2 Before Rendering The Judgment Of Civil Action 1. If The Court Will Not Allow The Petitioner To Exhaust His Legal Administrative Remedies, Or Rectify The Error, The Petitioner Will Be Unlawfully Punished By The Court's Abuse Of Discretion To Dismiss Civil Action 2 On The Ground Of *Res Judicata.* It Would Also Pre-empt The Federal Government Regulations.**

The Petitioner filed a Motion to the Merit Systems Protection Board (MSPB) requesting a stay for two EEO complaints contained in Civil Action 1 because the Petitioner did not exhaust his legal administrative remedies for the four EEO complaints contained in Civil Action 2 [Petitioner's Oral Arguments Ex. J]. The MSPB took unlawful steps denying the Petitioner's request to include all of the claims and even denied Petitioner's request to exhaust his legal administrative remedies for four EEO complaints. The EEOC unlawfully issued the decision on two EEO complaints contained in Civil Action 1 and provided the right to file a Civil Action, knowing that the Petitioner has not legally exhausted his administrative remedies for four EEO complaints contained in Civil Action 2.

Moreover, the District Court erroneously granted a Motion for Summary Judgement in favor of the Respondent for Civil Action 1 whereas the Court unlawfully disallowed the Petitioner to exhaust administrative remedies for his four EEO complaints contained in Civil Action 2 and dismissed the Civil Action on the ground of *Res judicata.*

A. The Respondent argued in his informal brief requesting to confirm the District Court's judgement because,

> "Plaintiff could have sought leave either to stay his Civil Action pending the outcome of the Agency proceedings or to amend his 2002 Complaint upon the Agency's dismissal of his administrative claims ... Plaintiff did neither" (p. 11, Appellee's Informal Brief).

The Respondent's arguments has no merit because in fact the District Court, EEOC, and the MSPB were well aware of the Agency's futile attempt to amend the Petitioner's EEO complaints [Petitioner's Oral Arguments Ex. G-1-2] stating,

> "We are requesting that the three complaints be processed together because they all involve the same set of circumstances. The first complaint involves the fact that complainant was placed on a Performance Improvement Plan (PIP). In the second complaint (97-LE-MS02) complainant alleges that the progress reports from that PIP comprise harassment...The third and instant complaint (98-LE- MS01) concerns the termination that resulted from the unsatisfactory completion of the PIP."

B. In fact, the Petitioner took every lawful step by filing a motion for stay for EEO complaints contained in Civil Action 1 [Petitioner's Oral Arguments Ex. J]. However, the MSPB and the District Court misapplied the law and denied the Petitioner's request for a stay, granting a Motion for Summary Judgment in favor of the Respondent and dismissing the Petitioner's Civil Action 1.

CONCLUSION

The Petitioner, an *indigent pro se,* is incapable of applying any case law. However, he has carefully presented all of the facts showing the illegality of denying a Petitioner's right to exhaust his administrative remedies for his EEO complaints before the Court issues any judgement for these Civil Actions.

This case merits the Supreme Court's review and warrants the Supreme Court's intervention, as the 4th Circuit and the District Court took unlawful steps to pre-empt the federal government regulations by denying the petitioner's right to exhaust his legal administrative remedies for four EEO complaints contained in Civil Action 2 before rendering a judgment for Civil Action 1. If the Court will not rectify these errors, every employee nationwide, including the Petitioner, will be punished for Court errors and their abuse of discretion. For all of the foregoing reasons, the petitioner respectfully prays that the Supreme Court grant review of this matter.

Respectfully submitted,

Mahesh C. Sikka, RA, *pro se*
Architect
12601 Hogan's Alley
Chester, VA 23836
(804) 530-0950

APPENDIX A

Civil Action 2

NO. 05-1121 (CA-03-895-3)

DENIAL OF PETITION FOR REHEARING

AND

REHEARING *EN BANC* DATED AUGUST 16, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 16, 2005

No. 05-1121
CA-03-895-3

MAHESH C. SIKKA
Plaintiff - Appellant

v.

DONALD H. RUMSFELD, Secretary,
Department of Defense; U. S.
DEFENSE COMMISSARY AGENCY
Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Gregory and Judge Shedd.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX B

Civil Action 2

NO. 05-1121 (CA-03-895-3)

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE FOURTH CIRCUIT

DATED JUNE 8, 2005

JUDGMENT
FILED: June 8, 2005

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 05-1121
CA-03-895-3

MAHESH C. SIKKA
Plaintiff - Appellant

v.

DONALD H. RUMSFELD, Secretary,
Department of Defense; U. S.
DEFENSE COMMISSARY AGENCY

Defendants - Appellees

Appeal from the United States District Court for the
Eastern District of Virginia at Richmond

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon i6suance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1121

MAHESH C. SIKKA,
Plaintiff - Appellant,
versus

DONALD H. RUMSFELD, Secretary, Department of Defense; U.S. DEFENSE COMMISSARY AGENCY,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CA-03-895-3)

Submitted: May 18, 2005 Decided: June 8, 2005

Before KING, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Mahesh C. Sikka, Appellant Pro Se. Robert P. McIntosh, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Mahesh C. Sikka appeals the district court's order adopting the report and recommendation of a magistrate judge and granting summary judgment for Defendants on Sikka's Title VII action. We have reviewed the record and find no reversible error. Accordingly, we affirm substantially for the reasons stated by the district court. See Sikka v. Rumsfeld, No. CA-03-895-3 (E.D. Va. Nov. 16, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

Civil Action 2

NO. 05-1121 (CA-03-895-3)

U.S. DISTRICT COURT GRANTED THE MOTION FOR SUMMARY JUDGEMENT TO THE RESPONDENT ON NOV. 16, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MAHESH C. SIKKA,
Plaintiff,

v. Civil Action No. 3:03cv895

DONALD H. RUMSFELD, et al.,
Defendants.

ORDER

By Order entered herein on May 19, 2004, the pending Motion for Summary Judgment (Docket No. 3) filed by the defendants was referred to Magistrate Judge David G. Lowe for report and recommendation.

Having reviewed the Report and Recommendation of the Magistrate Judge entered herein on October 4, 2004 (Docket No. 20), the plaintiff's objection thereto (Docket No. 24), and the defendants' response to the objection (Docket No. 25) and having considered the record and the Report and Recommendation and finding no error therein, it is hereby ORDERED that:

(1) The Plaintiff's Objection to the Report and Recommendation Issued by Judge Lowe (Docket No. 24) is overruled;

(2) The Report and Recommendation of the Magistrate Judge is ADOPTED on the basis of the reasoning of the Report and Recommendation;

(3) The Motion for Summary Judgment (Docket No. 3) is GRANTED;

(4) The Motion for Representation at Hearing filed by the plaintiff is DENIED as moot; and

(5) This action is dismissed with prejudice.

The issues are adequately addressed by the briefs and oral argument would not materially aid the decisional process.

This Order may be appealed by the Plaintiff. Any appeal from this decision must be taken by filing a written notice of appeal with the Clerk of the Court within sixty (60) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel of record.

It is so ORDERED.

/s/

United States District Judge

Richmond, Virginia
Date: November 16, 2004

APPENDIX D

Civil Action 2

NO. 05-1121 (CA-03-895-3)

REPORT AND RECOMMENDATIONS

OF THE MAGISTRATE JUDGE OF THE

U.S. DISTRICT COURT DATED OCT. 4, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MAHESH C. SIKKA,
Plaintiff,

v. Civil Action No. 3:03CV895

DONALD H. RUMSFELD, et al.,
Defendants.

REPORT & RECOMMENDATION

Plaintiff Mahesh C. Sikka, an Asian male who is a native of India, brings this action against his former employer alleging discrimination based on race, national origin and disability; retaliation; and hostile work environment under Title VII. Defendants filed a motion for summary judgment, to which Plaintiff responded. Pursuant to 28 U.S.C. 5 636(b), the matter was referred to the United States Magistrate Judge for a report and Recommendation.- At Plaintiff's request, oral argument was heard, and the matter now is ripe for disposition.

Undisputed Facts

The Court has reviewed the parties' submissions and finds the following relevant facts to be undisputed:

1. Plaintiff was employed by the Defense Commissary Agency (DeCA) until he was terminated effective July 11, 1997.

2. On April 10, 2002, Plaintiff filed a complaint ("2002 Complaint") against DeCA and Donald Rumsfeld alleging discrimination based on race and national origin, retaliation for engaging in protected EEO activity, disability discrimination, and harassment creating a hostile work environment.

3. Plaintiff later conceded that he did not have a cause of action with regards to the disability discrimination claim.

4. At the time Plaintiff filed the 2002 Complaint, four administrative complaints of discrimination ("administrative complaints") were pending investigation by the Agency's EEO office.

5. On June 21, 2002, the Agency issued a letter to Plaintiff. The letter stated:

> Upon review of the civil action, (Case Number 3:02CV235) and the complete files of the subject complaints, I find that **all** allegations of the subject complaints ... have been included as part of this filing.
>
> Federal regulations at 29 CFR 1614.107(a) (3) require that an agency dismiss an entire complaint that is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint. Based on this and the fact that the allegations contained in complaints 96-LE-MS-05, 97-LE-MS-01, 97-LE-ME-03 and 97-LE-MS-03 have all been included in the pending civil action, these administrative complaints are hereby dismissed in their entirety.

Defendant's Exhibit 6 (emphasis in original). This was the Agency's final decision on the four administrative complaints.

6. Plaintiff did not move to amend his 2002 Complaint to include the four administrative complaints.

7. On April 23, 2003, the Court granted Defendants' motion for summary judgment and entered judgment against Plaintiff on his 2002 Complaint.

8. On May 29, 2003, the EEOC affirmed the final agency decision dismissing the administrative complaints.

9. On July 29, 2003, the EEOC denied Plaintiff's request for reconsideration.

10. On October 24, 2003, Plaintiff filed the instant complaint ("2003 Complaint") against DeCA and Donald Rumsfeld, alleging discrimination based on race and national origin, retaliation for engaging in protected EEO activity, disability discrimination, and harassment creating a hostile work environment.

11. The 2003 Complaint is based on the four administrative complaints.

12. On August 17, 2004, the United States Court of Appeals for the Fourth Circuit issued a final decision, affirming the district court's decision in the 2002 action.

Standard for Motion for Summary Judgment

Summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the responsibility of the party seeking summary judgment to inform the court of the basis for its motion, and to identify the parts of the record which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the non-moving party will bear

the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." Celotex, 477 U.S. at 324 (internal quotations omitted). The moving party may also use affidavits to support its motion. Then the non-moving party must go beyond the pleadings and, by its own affidavits or by the "depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id.

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). It is not the function of the district court to weigh the evidence, but rather to determine whether there is a genuine issue for trial, and "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249 (citations omitted).

Conclusions of Law

The doctrine of res judicata bars a second attempt to litigate the same cause of action between the parties. United States v. Tatum, 943 F.2d 370, 381 (4th Cir. 1991). The doctrine bars not only issues that were raised, but also issues that could have been raised in the earlier action. Id. In this Circuit there are three elements necessary to apply the doctrine of res judicata: (1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action. Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1473 (4th Cir. 1996).

Here, a final judgment on the merits was entered in the prior action (the 2002 Complaint), and the parties are identical. Thus, the only remaining question is whether the current case involves the same cause of action as the previous case.

Res judicata precludes an action when the new claim arises out of the same transaction or series of transactions as the claim resolved in the prior judgment, Harnett v. Billman, 800 F.2d 1308, 1313 (4th Cir. 1986), or arises out of the same core of operative facts. Grausz v. Englander, 321 F.3d 467, 473 (4th Cir. 2003). Here, Plaintiff argues that the suits are not similar, but instead "complementary, in the sense that the current civil action resolves/presents many of the claims and allegations that must be resolved prior to dealing with the previous complaint." Plaintiff's Request to Dismiss Defendant's [sic] Motion for Summary Judgment, p. 3. Plaintiff's complaints, the parties' exhibits, and Plaintiff's oral arguments at the August hearing establish that this case involves the same cause of action as Plaintiff's 2002 action. Both suits allege racial and national origin discrimination, harassment, and retaliation arising from Plaintiff's employment and termination with DeCA. In both suits Plaintiff complains about his treatment by co-workers and supervisors, his placement on a Performance Improvement Plan, and the editing of his trip reports. The 2002 and 2003 complaints stem from the same transaction and share a common nucleus of facts. See Steward v. Gwaltney of Smithfield, Ltd., 954 F. Supp. 1118, 1122 (4thcir. 1996). Plaintiff could have sought leave either to stay his civil action pending the outcome of the Agency proceedings or to amend his 2002 Complaint upon the Agency's dismissal of his administrative claims. See Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 714-15 (9th Cir. 2001) (collecting cases). Plaintiff did neither.

Defendants have established all three elements required to apply the doctrine of res judicata. Accordingly, it is RECOMMENDED that Defendants' motion for summary judgment be GRANTED.

The parties are ADVISED that they may file specific written objections to the Report and Recommendation within ten (10) days of the date of entry hereof. Such objections should be numbered and identify with specificity the legal or factual

deficiencies of the Magistrate Judge's findings. Failure to timely file specific objections to the Report and Recommendation may preclude further review or appeal from such judgment. See Wright v. Collins, 766 F.2d 841 (4th Cir. 1985).

Let the Clerk of the Court send a copy of this Report and Recommendation to the Honorable Robert E. Payne, Plaintiff, and all
counsel of record.

UNITED STATES MAGISTRATE JUDGE

Richmond, Virginia
Date: Oct. 4, 2004

APPENDIX E

Civil Action 1

NO. 03-1777 (CA-02-235-3)

DENIAL OF PETITION FOR REHEARING

AND

REHEARING *EN BANC* DATED AUGUST 9, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: August 9, 2004

No. 03-1777
CA-02-235-3

MAHESH C. SIKKA
Plaintiff - Appellant

v.

DONALD H. RUMSFELD; DEPARTMENT OF DEFENSE
Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for reheating and reheating en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for reheating en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Shedd, Judge King, and Judge Gregory.

For the Court,

/s/ Patricia S. Connor

_____

CLERK

APPENDIX F

Civil Action 1

NO. 03-1777 (CA-02-235-3)

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE FOURTH CIRCUIT

DATED JUNE 2, 2004

JUDGMENT
FILED: June 2, 2004

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 03-1777
CA-02-235-3

MAHESH C. SIKKA

Plaintiff - Appellant

v.

DONALD H. RUMSFELD; DEPARTMENT OF DEFENSE
Defendants - Appellees

Appeal from the United States District Court for the
Eastern District of Virginia at Richmond

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1777

MAHESH C. SIKKA,
Plaintiff - Appellant,
versus

DONALD H. RUMSFELD; DEPARTMENT OF DEFENSE,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. David G. Lowe, Magistrate Judge. (CA-02-235-3)

Submitted: May 5, 2004 Decided: June 2, 2004

Before KING, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Mahesh C. Sikka, Appellant Pro Se. Robert P. McIntosh, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c) .

PER CURIAM:

Mahesh C. Sikka appeals the magistrate judge's grant of summary judgment for the Government on his retaliation and hostile work environment discrimination claims.* We affirm.

We review a grant of summary judgment de novo. Higgins v. E. I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). We must view the factual evidence, and all justifiable inferences drawn therefrom, in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

We conclude that viewing the evidence in a light most favorable to Sikka, the Government is entitled to summary judgment on his hostile work environment and retaliation claims as a matter of law. Accordingly, we affirm the decision of the magistrate judge. We grant Sikka's motion to file an oversize informal brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

---

* The parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c) (2000).

APPENDIX G

Civil Action 1

NO. 03-1777 (CA-02-235-3)

JUDGEMENT OF THE U.S. DISTRICT COURT

DATED APRIL 23, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Mahesh C. Sikka
Plaintiff,

v. Civil Action No. 3:02CV235

DONALD H. RUMSFELD, et al.,
Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, it is ORDERED that Defendant's motion for summary judgment is GRANTED, Plaintiff's claims are DISMISSED, Defendant's motion to strike is DENIED as moot, and this action is DISMISSED with prejudice.

Plaintiff may appeal the decision of the Court. Should he wish to do so, written notice of appeal must be filed with the Clerk of the Court within sixty (60) days of the date of entry hereof.

Let the Clerk send a copy of the Order and accompanying Memorandum Opinion to Plaintiff and all counsel of record.

/s/
UNITED STATES MAGISTRATE JUDGE

Richmond, Virginia
Date: April 23, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Apr 23, 2003

MAHESH C. SIKKA,
Plaintiff,

v. Civil Action No. 3:02CV235

DONALD H. RUMSFELD, et al.,
Defendants.

MEMORANDUM OPINION

Plaintiff Mahesh C. Sikka, an Asian male who is a native of India, brings this action against his former employer alleging disability discrimination, retaliation, and hostile work environment under Title VII. Defendant filed a motion for summary judgment, to which Plaintiff has responded. Defendant filed a reply, and Plaintiff was permitted to file a surreply. Defendant also moved to strike portions of Plaintiff's response, and Plaintiff responded in opposition to the motion. Oral argument was heard, and the matter is ripe for disposition. Jurisdiction is appropriate pursuant to 28 U.S.C. § 636(c).

Undisputed Facts

On March 13, 2003, Defendant filed a Statement of Undisputed Facts. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment noted several changes and additions to the Statement of Undisputed Facts.

The Court has reviewed the parties' submissions and finds the following relevant facts to be undisputed:

1. Plaintiff's instant action is based on two EEOC decisions dated February 28, 2002 and March 8, 2002.

2. The February 28, 2002 decision addressed three separate incidents occurring in March and April of 1996: a co-worker's comment during a meeting; a co-worker's threatening gesture; and a co-worker's email.

A. Plaintiff complained that he was subjected to racial and national origin harassment and reprisal when he was "insulted" during a meeting by a co-worker who commented that Plaintiff was "wasting time and distracting the meeting." The co-worker, Tarun K. Sen, is a native of India and of the same race and national origin as Plaintiff.

B. Mr. Coston, Plaintiff's supervisor, had been present in the meeting on March 20, 1996, when Mr. Sen made the comment that Mr. Sikka was "wasting time and distracting the meeting." Immediately after Mr. Sen made his comment and while the meeting was still in progress, Mr. Coston escorted Mr. Sen out of the meeting and orally admonished him for the outburst.

C. Plaintiff was not satisfied with Mr. Coston's reprimand of Mr. Sen.

D. On April 24, 1996, Plaintiff reported that Stephen Schilling, Plaintiff's co-worker, threatened Plaintiff by raising a rolled up drawing and making a threatening gesture as Plaintiff passed Mr. Shilling.

E. Leland Schneider, Mr. Schilling's supervisor, began an investigation into Plaintiff's allegations.

F. In the course of the investigation, Mr. Schilling emailed Mr. Schneider. Mr. Schilling's email denied the allegations charged by "some minority," and likened Plaintiff to "a pit viper waiting to strike."

G. Plaintiff added Mr. Schilling's threatening gesture to his EEO complaint about Mr. Sen. During the investigation into his EEO complaint, Plaintiff received a copy of Mr. Schilling's email. The email was then added as a third issue before the EEOC.

H. The EEOC found no discrimination or harassment and issued a final opinion on the matter on February 28, 2002.

3. The March 8, 2002 decision addressed Plaintiff's placement on a Performance Improvement Plan, his receipt of progress reports, and his subsequent termination.

A. In October 1995 and until his termination in July 1997, Plaintiff was an architect with the Defense Commissary Agency ("DeCA") working under the supervision of Kenneth Coston.

B. In January 1996, Mr. Kenneth Coston, Plaintiff's direct supervisor, provided Plaintiff with a Civilian Performance Plan.

C. In October 1996, Plaintiff was warned that his job performance was unacceptable. Plaintiff was placed on a Performance Improvement Plan ("PIP").

D. A major component of Plaintiff's performance during the PIP centered on Plaintiff's proper completion of trip reports concerning visits he made to various Department of Defense commissary sites. During the period the PIP was in place, Plaintiff submitted drafts of at least seven trip reports.

E. During the PIP period, Mr. Coston provided extensive editorial comments to the trip reports. Plaintiff rejected Mr. Coston's comments, stating that his drafts of the reports were complete and professional and required no further revision. Plaintiff refused to make any of the revisions Mr. Coston required.

F. Mr. Coston later instructed Plaintiff to submit his final trip reports, with or without making the revisions. Plaintiff failed to submit the final trip reports. Mr. Coston ultimately completed the final trip reports himself.

G. Mr. Coston provided Plaintiff with a progress report dated October 15, 1996, which noted that Plaintiff had disputed Mr. Coston's comments on Plaintiff's performance and had not followed through on contacting individuals or obtaining information needed to complete his tasks. Plaintiff received eight more progress reports between October 15, 1996 and the end of January 1997.

H. At the conclusion of the PIP period, Mr. Coston determined that Plaintiff's performance was unacceptable and did not meet the expectations set forth in the PIP. Mr. Coston recommended that Plaintiff's employment with DeCA be terminated.

I. Plaintiff was permitted to respond to Mr. Coston's recommendation.

J. The agency subsequently determined that Plaintiff's performance was unacceptable. Plaintiff's employment was terminated effective July 11, 1997.

K. Plaintiff filed EEO complaints of discrimination and retaliation based on the issuance of the PIP, "inaccurate" progress reports, and his termination.

L. On March 8, 2002, the EEOC issued a final decision finding the agency had articulated legitimate nondiscriminatory reasons for its actions.

Standard for Motion for Summary Judgment

Summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the responsibility of the party seeking summary judgment to inform the court of the basis for its motion, and to identify the parts of the record which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the non-moving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." Celotex, 477 U.S. at 324 (internal quotations omitted). The moving party may also use affidavits to support its motion. Then the non-moving party must go beyond the pleadings and, by its own affidavits or by the "depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Id.

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). It is not the function of the district court to weigh the evidence, but rather to determine whether there is a genuine issue for trial, and "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249 (citations omitted).

Disability Discrimination

Defendant moves to dismiss Plaintiff's claim of discrimination based on a disability. Plaintiff does not oppose the motion for summary judgment as to this ground. Accordingly, Plaintiff's claim for disability discrimination will be DISMISSED.

Retaliation

Title VII prohibits discrimination against any employee who "has opposed any ... unlawful employment practice" under Title VII. 42 U.S.C. ~ 2000e-3(a). In order to establish a prima facie case of retaliation, an employee must present evidence that he engaged On March 8, 2002, the EEOC issued a final decision finding the agency had articulated legitimate nondiscriminatory reasons for its actions. in protected activity, that his employer took an adverse employment action against him, and that there was a causal connection between the two events. See Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998). Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. Id. at 442. If the employer succeeds in doing so, the plaintiff must then demonstrate that the employer's asserted reason is simply a pretext for retaliation. Id.

To establish a pretext case before Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), a plaintiff would have had to prove that the employer's proffered reason was false and then introduce independent evidence that discrimination was the real reason for his discharge. See, e.q., Jiminez v. Mary Washington Coil., 57 F.3d 369, 378 (4th Cir. 1995). However, "the Reeves Court made plain that, under the appropriate circumstances, 'a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully [retaliated].'" EEOC v. Sears Roebuck & Co., 243 F.3d 846, 852 (4th Cir. 2001) (quoting Reeves, 530

U.S. at 148). In other words, "it is permissible for the trier of fact to infer the ultimate fact of [retaliation] from the falsity of the employer's explanation." Reeves, 530 U.S. at 147. Of course, if no rational factfinder could find for the employee, then summary judgment is appropriate. See Rowe v. Marley Co., 233 F.3d 825, 830 (4th Cir. 2000). However, if the plaintiff creates a genuine issue of material fact on whether the proffered reason was pretextual, then the employer must be denied summary judgment.

The Court assumes, for purposes of Defendant's motion for summary judgment, that Plaintiff can establish a prima facie case of retaliation. Accordingly, the Court turns to whether Defendant has offered a legitimate, nondiscriminatory reason for Plaintiff's termination. plaintiff admits that the completion of trip reports was a major component of his job. Plaintiff further admits that he refused to revise the trip reports or to submit final drafts of the reports. Plaintiff's actions constituted insubordination.

Plaintiff argues that there is an inference of pretext because Plaintiff's performance evaluations prior to January 1996 were positive. However, as previously noted, Plaintiff acknowledges that he was not completing a major component of his job and he was insubordinate to his supervisor. Plaintiff has failed to establish that Defendant's reasons for his termination were pretextual. The retaliation claim will be DISMISSED.

Hostile Work Environment

To state a hostile work environment claim, Plaintiff must allege that (1) he experienced unwelcome harassment; (2) the harassment was based on his gender, race or age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. Bass v. E. I. DuPont de Nemours & Co., Nos.

02-1129, 02-1456, 02-1989, slip op. (4th Cir. March 26, 2003). The harassment is actionable only if it is "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Say. Bank v. Vinson, 477 U.S. 57, 67 (1986) (internal quotation omitted) (alteration in original). In order to determine whether the conduct alleged by Plaintiff was sufficiently severe or pervasive to establish a prima facie case, the Court must examine the totality of the circumstances, including "[t]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Although the question whether the harassment is sufficiently severe or pervasive is quintessentially a question of fact, Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994), where the conduct is neither sufficiently severe nor pervasive to create an environment that a reasonable person would find hostile or abusive, summary judgment is appropriate. See Hopkins v. Baltimore Gas and Electric Co., 77 F.3d 745, 753 (4th Cir. 1996).

Plaintiff's complaint is full of problems he experienced with his co-workers. However, there are only three incidents presently before the Court by virtue of the February 28, 2002 EEOC decision. The three incidents are: (1) on March 26, 1996, Plaintiff was insulted when Tarun Sen, an Asian co-worker from India, stated that Plaintiff was "wasting time and distracting the meeting;" (2) on April 11, 1996, Stephen Schilling, a Caucasian co-worker, threatened Plaintiff by raising a rolled up drawing near Plaintiff's face; and (3) on April 26, 1996, Stephen Schilling wrote an email to his supervisor denying the April 11 allegations charged by "some minority," and likening Plaintiff to "a pit viper waiting to strike." The parties have also argued about whether a fourth incident also constitutes a hostile work environment. That incident occurred

on May 6, 1996, when Plaintiff overheard Mr. Sen refer to Plaintiff as an "SOB" during a telephone conversation with another co-worker. Plaintiff filed an EEO complaint based on this fourth incident, and the matter was settled.

Plaintiff fails to establish the second and third elements of a prima facie case. None of the incidents indicate that their genesis was in Plaintiff's race or national origin. Indeed, Mr. Sen is of the same race and national origin. In any event, the incidents, viewed individually or collectively, are neither severe nor pervasive enough to alter the terms and conditions of Plaintiff's employment. The environment was not objectively hostile. Plaintiff's hostile work environment claim will be DISMISSED.

Defendant's motion to strike will be DISMISSED as moot.

The Clerk of Court is DIRECTED to send a copy of the Memorandum Opinion and the accompanying Order to Plaintiff and all counsel of record.

UNITED STATES MAGISTRATE JUDGE

Richmond, Virginia
Date: Apr 23, 2003